NO. 20185

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BERT HOOPES and RAE S. OPES,	)
Appellants,	)
vs.	)
ION OIL COMPANY OF LIFORNIA, a corporation	)
Appellee.	)

REPLY BRIEF

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REPLY BRIEF

Preface

This Reply Brief will be limited to comment on a few of the points raised or ignored in appellee's Brief. No effort will be made to re-argue matters set forth in Appellant's Opening Brief. Positions taken there are not waived but relied on.

Remoteness of Injury

On Page 17, in its Summary of Argument, appellee asserts that the injuries suffered by appellants are too remote to be cognizable under the antitrust laws. We disagree, but nevertheless feel that appellees for the first time have placed the matter in proper legal perspective.

The question is not whether appellants were lessors, contract vendors, or service station operators, but whether or not the unlawful actions of appellees were the proximate cause of appellants' injuries.

Appellee, as is customary in antitrust cases, seeks to set this case off from others by razor-fine distinctions. The argument made is that the lessor can recover only when it joins the lessee as a defendant or conspirator. It need not keep the lessee in the case but only have him in at the beginning. This in essence is the argument advanced on Page 20 of appellee's Brief. It is on this basis that appellee seeks to avoid

teiner v. Twentieth Century Fox Film Corporation (9th Cir. 1956) 32 F. 2d 190, cited and quoted from on Pages 13, 14 and 15 of ur opening Brief. In Steiner the lessee was an original defen- ant, but the case was dismissed as to him.

Appellee, on Page 22 of its Brief, in effect urges this ourt to depart from the doctrine of Steiner in favor of the uch criticized and sometimes repudiated holding in Harrison . Paramount Pictures, Inc., 115 F. Supp. 312, affirmed 211 . 2d 405. Even there the Court pointed out on Page 317 that he unlawful acts had not forced the tenant to default on the ent, which at all times had been paid in full; further, that he plaintiff and defendants there had no direct business deal- ngs. These statements alone make Harrison inapplicable here.

On Page 30 of its Brief, appellee states that --

> "Appellants were in no way the object of a conspiracy or antitrust violation. They, by their own allegations, were injured only indirectly as the result of the alleged injury suffered by their lessee."

The statement is inapplicable. Perhaps appellants ersonally were not the object of the antitrust violation, but heir property was. The injury was to appellants' property, and t was direct. It was appellants' property which was the very ubject matter of the involved transactions which Judge abinowitz held to constitute an exclusive requirements contract. t was appellants' property which was the subject of the lease nd the lease-backs. The secret rebates and secret guarantees ad to do with petroleum products sold on the property and ayments made to the bank toward the purchase of it. The uit which was heard before Judge Rabinowitz was directed

at the property and brought for the purpose of enforcing the illegal requirements contract. It was the acts of appellee, directed to the property, which forced Transfare, Inc. to vacate the property and which made it impossible for appellants to lease the property and diminished its sale value.. Appellants are not "the bystander who was hit but not aimed at" mentioned in Karseal Corp. v. Richfield Oil Corp., 221 F. 2d 358 (9th Cir., 1955), quoted by appellee on Page 32 of its Brief. These injuries were inflicted directly on appellants' property. Appellees cannot escape liability simply by contending that Transfare, Inc., the one-time lessee, was also injured.

Section 3 of Clayton Act

Under II,D, on Page 11 of its Brief, appellee attempts to avoid the impact of Section 3 of the Clayton Act, 15 USCA, Section 14, by asserting that no allegation of violation of Section 3 is found in the Complaint nor stated to be an issue in the Pre-Trial Order. The record does not sustain appellee. Judge Hodge, by Section 8 of his Pre-Trial Order (R.118), granted appellants leave to amend --

> "to further clarify their position with respect to violation of the antitrust laws relied upon."

Appellants amended in accordance with the leave granted (R.119) and alleged violation of --

> "the antitrust laws of the United States as same are defined in Section 1 of the Clayton Act, Title 15, Section 12, USCA. . . . ."

Section 15 of the Complaint (R.10) pleads facts establishing the violation. Nor did appellants at any time bandon their claim as to violation of Section 3 of the Clayton ct; neither did appellees ever challenge the sufficiency f the Complaint in that respect or make any mention of Section 3 in its various motions for summary judgment. The Motion for Partial Summary Judgment and for Supplementary Prerial Order Further Limiting Issues" (R.187) was limited to ections 1 and 2 of the Sherman Act (R.187) and Section 2 of he Clayton Act (R.188). Judge Plummer did not grant the otion as made, but by "Memorandum to Counsel and Order" (R.197) ound that appellants lacked standing to sue under Sections 1 nd 2 of the Sherman Act or Section 2 of the Clayton Act and --

> "that in so holding all antitrust claims will be eliminated." (R.198)

Appellants, believing the holding to be in error, ave prosecuted this appeal.

tatute of Limitations

Triple damage actions are granted by 15 USCA, Section 15, being Section 4 of the Clayton Act, to "any person njured in his business or property," and the recovery alowed is "threefold damages by him sustained." Under appelee's theory, the action was barred before it arose. Appellee

would have the four-year statute commence to run on December 21, 1955. But how could the statute commence to run until the right of action had accrued? What action could appellants have brought against appellee on December 21, 1955? They had suffered no damage to business or property. This is not an action by the United States brought in the public interest. It is an action based on injury suffered by appellants and could not arise until appellants were injured. On December 21, 1955, and for years thereafter, appellants were receiving payments under their contract to sell the service station to Hart. Hart's assignees eventually abandoned the contract and quitclaimed the property to appellants, who retained all payments previously made. Appellants leased the service station to Transfare, Inc. and received rental payments until April 12, 1961, when, by reason of the unlawful acts of appellee, Transfare, Inc. discontinued the rental payments and vacated the property. At this point the impact of the violation was felt by appellants. They lost the rental and the value of the property was depressed by reason of the action of appellee.

Nor do the authorities cited by appellee reach a different conclusion. In Steiner v. Twentieth Century Fox Film Corporation (9th Cir., 1956), 232 F. 2d 190, cited and quoted from on Pages 49 and 50 of appellee's Brief, the Court, in commenting on earlier cases, said --

> "Those decisions merely hold that in order to start the running of

> the statute of limitations, there must be damages occasioned by an overt act."

Again, on Page 52 of its Brief, appellee quotes from rbenfabriken Bayer, A.G. v. Sterling Drug, 153 F. Supp. 589 .C.N.J. 1957), where the Court points out that the statute mmences to run when the action accrues, and that the action crues when two separate events occur --

> "first, the overt act of one or more of the conspirators in the furtherance of the conspiracy;"

and

> "second, the consequential damage to the rights of another of which the overt act is the proximate cause."

Furthermore, this is not a conspiracy case. The sis of the action is a contract in restraint of trade, whereby pellee successfully attempted to monopolize and did monopo- ze. It is properly summarized in appellant's answer to Union l Interrogatory No. 1 (R.147-149), which in turn is quoted on ges 12 and 13 of appellee's Brief.

It is not the written agreement of December 21, 1955, anding alone which constitutes the violation, but such agree- nt together with various leases, lease-backs, discounts, cret guarantees, oral agreements made and extracted, and the neral course of action followed by appellee which Judge binowitz found to constitute the exclusive requirements con- act of long duration which we contend violated the antitrust ws. The written agreement of December 21, 1955, was the

eginning and not the final consummation of the illegal arrange-
ent.

upreme Court

As pointed out, beginning on Page 31 of appellants' rief, the rule narrowly restricting the right to sue for vio-ation of the antitrust laws is not supported by the Supreme ourt. Safeway Stores v. Vance (1957) 355 US 389, 78 S.Ct. 358, L. ed. 2d 350, and Nashville Milk Company v. Carnation ompany (1958) 355 US 373, 78 S.Ct.352, 2 L. ed. 340, cited n Page 32, are ignored by appellee, and Moore v. Mead's Fine read Company (1954), 348 US 115, 75 S.Ct.148, 99 L. ed. 145, s given passing comment on another point.

We submit that when Harrison, supra, and the authori-ies cited by appellee, are considered in the light of the ecent Supreme Court pronouncements, the contention advanced y appellee cannot be sustained.

ummary Judgment for Appellants

Appellant, in its opening Brief, pointed out, begin-ing on Page 33, that on the basis of the recent decrees in impson v. Union Oil Co. of Cal., 377 US 13, 84 S.Ct.1051, 2 L. ed. 2d 98, appellants are entitled to summary judgment n the issue of liability. This point is also ignored by ppellee.

Dated October 8th, 1965.

Respectfully submitted,

W C Arnold

W.C. ARNOLD, Attorney for Appellants

CERTIFICATE OF COUNSEL

I certify that in connection with the preparation of his Brief I have examined Rules 18 and 19 of the United tates Court of Appeals for the Ninth Circuit, and that, in y opinion, the foregoing Brief is in full compliance with hose rules.

W C Arnold

W.C. ARNOLD, Attorney for Appellants